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DORMANT COMMERCE CLAUSE REVIEW: WHY THE NINTH CIRCUIT DECISION IN *COREY* STRAYED FROM PRECEDENT AND WHAT THE SUPREME COURT COULD HAVE DONE ABOUT IT

HWI HAROLD LEE *

Abstract: In 2007, the California state legislature enacted the Low-Carbon Fuel Standard, or LCFS, limiting carbon emissions from transport fuels throughout the fuels' entire "lifecycle," by assigning "carbon intensity" scores to each fuel product. These scores are calculated using a variety of measurements, including the amount of carbon emitted while producing the fuels and in transporting them to California. Out-of-state fuel suppliers challenged that the LCFS places an unconstitutional burden on interstate commerce because their products would inevitably have higher carbon intensity scores than their in-state counterparts, based merely on the distance traveled. The dispute reached the U.S. Court of Appeals for the Ninth Circuit in *Rocky Mountain Farmers Union v. Corey*. This Comment argues that although the Ninth Circuit correctly found the LCFS to be valid under the Dormant Commerce Clause, it erred in finding that the text of the LCFS's was not facially discriminatory, which would have required the court to have applied strict scrutiny. This Comment further argues that the Supreme Court should have granted certiorari to provide a clear instruction on whether a Dormant Commerce Clause analysis could be performed relying solely on the state legislature's purported reasoning, and without regard to the challenged law's discriminatory text.

INTRODUCTION

Coping with historic droughts has become an inevitable task for Californians.¹ On April 22, 2014, the U.S. Drought Monitor announced that for the first time in fifteen years, it observed every square inch of California to be suffering from moderate-to-severe drought.² The National Aeronautics

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¹ See Press Release, Cal. Office of Governor, Governor Brown Issues Executive Order to Streamline Approvals for Water Transfers to Protect California's Farms (May 20, 2013), available at <http://gov.ca.gov/news.php?id=18048>, archived at <http://perma.cc/P2X3-YVWW>.

² *U.S. Drought Monitor Update for April 22, 2014*, NOAA NAT'L CLIMATIC DATA CTR. (Apr. 22, 2014), <https://www.ncdc.noaa.gov/news/us-drought-monitor-update-april-22-2014>, archived at <http://perma.cc/6Y8G-KN4J>.

and Space Administration (NASA) also reported that the periods three, six, and twelve months prior to January 2014 were “all the driest periods in California since record-keeping started in 1885.”³ From February 1, 2013 through January 31, 2014, the state received less than seven inches of precipitation.⁴ By contrast, the average annual precipitation in California is over twenty-two inches.⁵ Such an unusual dry season, if it continues, could devastate the state’s \$44.7 billion agricultural industry⁶ and further impact citizens’ lives by causing long term problems such as severe water shortages, spiking food costs, seawater intrusion, and increased risk of wild fires.⁷

Since as early as 2004, some researchers have pointed to global warming, which has been scientifically proven to be caused by the increasing levels of greenhouse gases (“GHGs”) in the atmosphere, as a possible culprit for these events.⁸ In response to the problems caused by global warming, the California legislature enacted Assembly Bill 32 (“AB-32”): the Global Warming Solutions Act of 2006.⁹ When it passed AB-32, the California legislature acknowledged the threat of global warming, stating that it “poses a serious threat to the economic well-being, public health, natural resources, and the environment of California.”¹⁰

With AB-32, the California legislature enabled the California Air Resources Board (“CARB”) to place limitations on the GHGs emitted by more

³ Mike Carlowicz, *Drought Stressing California’s Plantscape*, NASA EARTH OBSERVATORY (Feb. 14, 2014), <http://earthobservatory.nasa.gov/IOTD/view.php?id=83124>, archived at <http://perma.cc/M66M-8D7A>.

⁴ *Id.*

⁵ *See id.*

⁶ Andrew Freedman, *California Drought: No Relief in Sight*, THE GUARDIAN (Feb. 3, 2014, 11:01 AM), <http://www.theguardian.com/environment/2014/feb/03/california-drought-no-relief-in-sight>, archived at <http://perma.cc/N9LN-L3X8>.

⁷ *See* Tony C. Dreibus et al., *Food Prices Surge as Drought Exacts a High Toll on Crops*, WALL ST. J., Mar. 18, 2014, <http://online.wsj.com/articles/SB10001424052702303287804579445311778530606>, archived at <http://perma.cc/S456-QKSU> (noting that droughts drive up prices for many agricultural goods); *The California Drought*, USGS CAL. WATER SCI. CTR., <http://ca.water.usgs.gov/data/drought/drought-impact.html> (last modified Nov. 20, 2014), archived at <http://perma.cc/BX5F-XEW4> (noting that drought leads to water shortages, seawater intrusion, and increased wildfire risk).

⁸ *See* Joe Romm, *Climatologist Who Predicted California Drought 10 Years Ago Says It May Soon Be ‘Even More Dire,’* CLIMATEPROGRESS (Mar. 7, 2014, 12:26 PM), <http://thinkprogress.org/climate/2014/03/07/3370481/california-drought/>, archived at <http://perma.cc/BJ8H-67QZ> (citing Jacob O. Sewall & Lisa Cirbus Sloan, *Disappearing Arctic Sea Ice Reduces Available Water in the American West*, 31 GEOPHYSICAL RES. LETTERS, no. 6, 2004, at 1, 1, available at <http://onlinelibrary.wiley.com/doi/10.1029/2003GL019133/pdf>, archived at <http://perma.cc/7WFW-L66W> (predicting that disappearing arctic ice, caused by climate change, would cause drought in the American west)).

⁹ 2006 Cal. Stat. 89 (codified at CAL. HEALTH & SAFETY CODE §§ 38500–38599 (West 2007)).

¹⁰ *See* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1079 (9th Cir. 2013), cert. denied, 134 S. Ct. 2875 (2014) (quoting CAL. HEALTH & SAFETY CODE § 38501(a)).

than 33 million motor vehicles registered and operating in the state.¹¹ In 2007, CARB enacted the innovative Low-Carbon Fuel Standard (“LCFS”), which sought to limit the carbon emissions of transport fuels in their entire “lifecycles”—from production to consumption—by assigning “carbon intensity” scores to each fuel product sold in California.¹² Because these scores would include measuring the carbon emitted during the production and transportation of fuels to fuel blenders in California,¹³ the LCFS has become a target of hostile criticism and legal challenges from out-of-state fuel suppliers.¹⁴

The effort to repeal the LCFS culminated in *Rocky Mountain Farmers Union v. Corey*, where plaintiffs argued that the LCFS’s reliance on regional categories places an unconstitutional burden on interstate commerce.¹⁵ According to the plaintiffs, out-of-state fuel products will inevitably have higher carbon intensity scores than in-state products because of the greater distances traveled to deliver them.¹⁶ The U.S. Court of Appeals for the Ninth Circuit rejected this argument in *Corey* and held that the LCFS is not facially discriminatory.¹⁷ The Ninth Circuit remanded the case to the district court to consider whether the LCFS discriminates in purpose or in practical effect, instructing that if it does not, the lower court is to apply the lenient *Pike* balancing test.¹⁸

This Comment argues that the Ninth Circuit correctly found the LCFS to be valid under the Dormant Commerce Clause, but that the court arrived at its conclusion in reliance of the wrong legal standard.¹⁹ Because the text of the LCFS is facially discriminatory, the court should have relied on the

¹¹ See CAL. CODE REGS. tit. 17, § 95480 (2010); CAL. DEP’T OF MOTOR VEHICLES, STATISTICS FOR PUBLICATION: JANUARY THROUGH DECEMBER 2014 (2014), available at <http://apps.dmv.ca.gov/about/profile/official.pdf>, archived at <http://perma.cc/QFV8-JK5E> (noting that as of December 2014, there were 33,550,486 registered vehicles in California).

¹² See CAL. CODE REGS. tit. 17, §§ 95480, 95481(a)(11).

¹³ Measurements of transportation emissions would be based on the distances travelled. See *id.* § 95486 (outlining the methodology used to measure carbon intensity values).

¹⁴ See Press Release, Renewable Fuels Ass’n, Joint Statement: Ethanol Industry Files to Take LCFS Fight to United States Supreme Court (Mar. 20, 2014), available at <http://www.ethanolrfa.org/news/entry/joint-statement-ethanol-industry-files-to-take-lcfs-fight-to-united-states-/>, archived at <http://perma.cc/PUX8-SUQB>; Felicity Carus, ‘Clash of the Titans’: California’s Low Carbon Fuel Standard Battle, BREAKING ENERGY (May. 2, 2012, 11:30 AM), <http://breakingenergy.com/2012/05/02/clash-of-the-titans-californias-low-carbon-fuel-standard-bat>, archived at <http://perma.cc/JP65-DSN9>.

¹⁵ See *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013).

¹⁶ *Id.* at 1090.

¹⁷ *Id.* at 1107.

¹⁸ *Id.* (reversing the district court’s decision by finding LCFS’s ethanol provisions were not facially discriminatory); see *infra* notes 63–70 and accompanying text.

¹⁹ See *infra* notes 88–113 and accompanying text.

strict scrutiny test.²⁰ This Comment further argues that the U.S. Supreme Court should have granted certiorari because there needs to be a clearer instruction on whether a lower court reviewing a Dormant Commerce Clause case may ignore the text of a state law and instead rely on the enacting state's purported reasoning to find non-discrimination.²¹

I. FACTS AND PROCEDURAL HISTORY

As the first state to enact a law to regulate air pollution from motor vehicles,²² California has been regarded by Congress as a trailblazer in the nation's air pollution control efforts.²³ Continuing with that tradition, the CARB established the LCFS under executive order S-1-07, issued on January 19, 2007.²⁴ The LCFS was the first mandate in the world to address carbon dioxide (CO₂) emitted not only from the source, in this case the tailpipe of a motor vehicle, but also during the production, transportation, and distribution of petroleum-based fuels.²⁵ The stated goal of the standard was to reduce GHG emissions in California to 1990 levels by 2020.²⁶

In practice, the LCFS works by requiring fuel suppliers to adjust nearly all transportation fuel products used in California to meet an average annual limit of "carbon intensity," which measures CO₂ emitted during the entire lifecycle of the fuels, from well to wheels.²⁷ Under the cap-and-trade system,²⁸ a producer whose reported carbon intensity scores exceed the allowed annual limit may purchase credits from others whose products average below the limit.²⁹

²⁰ See *infra* notes 88–113 and accompanying text.

²¹ See *infra* notes 106–113 and accompanying text.

²² See KARL B. SCHNELLE, JR. & CHARLES A. BROWN, AIR POLLUTION CONTROL TECHNOLOGY HANDBOOK 13 (2001).

²³ See *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1078 (9th Cir. 2013) (quoting *Ford Motor Co. v. Env'tl. Prot. Agency*, 606 F.2d 1293, 1297 (D.C. Cir. 1979)) (noting that Congress allowed California to regulate air pollution with minimal federal oversight).

²⁴ CAL. OFFICE OF THE GOVERNOR, EXEC. ORDER NO. S-01-07 (2007), available at <http://www.arb.ca.gov/fuels/lcfs/eos0107.pdf>, archived at <http://perma.cc/KRN7-2GES>.

²⁵ See CAL. CODE REGS. tit. 17, §§ 95480, 95486 (2010) (noting the purpose of the regulation and the methodology for calculating carbon intensity); Press Release, Env'tl. Def. Fund, California Approves World's First Low Carbon Fuel Standard, Continuing Environmental Leadership (Apr. 23, 2009), available at <http://www.edf.org/news/california-approves-worlds-first-low-carbon-fuel-standard-continuing-environmental-leadership>, archived at <http://perma.cc/KA42-3RDD> (noting that the California LCFS was the world's first).

²⁶ CAL. HEALTH & SAFETY CODE § 38550 (West 2007).

²⁷ See CAL. CODE REGS. tit. 17, §§ 95482–95483, 95485.

²⁸ A cap-and-trade system allows participants to exchange allowance credits as currency in a market setting. See *Cap and Trade*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/captrade/> (last updated May 10, 2012), archived at <http://perma.cc/F6CM-4TX2>.

²⁹ See CAL. CODE REGS. tit. 17, §§ 95482–95483.

To satisfy the reporting responsibilities, producers can rely on “Table 6” of the LCFS, a schedule of the average values of carbon intensity scores, or “default pathways,” for each type of fuel sold on the California market.³⁰ CARB determined the values for each pathway using a modified version of the “Greenhouse Gases, Regulated Emissions, and Energy Use in Transportation” (“GREET”) model called “CA-GREET.”³¹ This model incorporates a blend of scientific factors including the producers’ efficiency of production, the type of electricity used to power the plant, the fuel used for thermal energy, and the emissions released while transporting the fuel.³²

Transportation emissions are calculated by considering, “(1) distance traveled, including distance traveled inside California to the fuel blender[,] (2) total mass and volume transported[,] and (3) efficiency of the method of transport.”³³ Using this model, CARB determined that, on average, California ethanol actually produces more transportation emissions than either Brazilian or Midwest counterparts because California does not grow corn and must import it, and because corn is heavier and more voluminous than refined ethanol.³⁴ Nevertheless, California ethanol results in the least carbon intensity scores overall.³⁵ If, however, a manufacturer finds the non-specific, region-based categorization under Table 6 to be an unfair or inaccurate representation of its fuels’ carbon intensity, it could register an individualized pathway.³⁶ The LCFS, in other words, provides fuel producers with the liberty to choose the most advantageous option.³⁷

The LCFS caused an uproar among Midwest ethanol suppliers that sell their products in California.³⁸ In December 2009, Rocky Mountain Farmers

³⁰ *Id.* § 95486(b)(1) tbl. 6; see *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1082 (9th Cir. 2013) (noting that fuel suppliers may use Table 6 to report carbon intensity scores).

³¹ See *Corey*, 730 F.3d at 1081–82.

³² *Id.* at 1083.

³³ *Id.*

³⁴ *Id.* Most domestic ethanol today is made by processing corn. See *id.* at 1082–83.

³⁵ See CAL. CODE REGS. tit. 17, § 95486(b)(1) tbl.6 (2010). This is because, among other factors, Table 6 assumes that California producers use more energy-efficient technologies, and rely on electrical grids that use renewable resources and natural gas that emit less GHGs than the coal-fired power plants used primarily in the Midwest. See *Corey*, 730 F.3d at 1083.

³⁶ It can do so using Method 2A or 2B. *Corey*, 730 F.3d at 1082 (citing CAL. CODE REGS. tit. 17, § 95486(c), (d)). Under Method 2A, a fuel producer can propose a replacement for one or more of the pathway’s average values if it can show that the proposed pathway has a carbon intensity at least a certain amount less than the default pathway, and if it is “expected to supply more than [ten] million gasoline-equivalent gallons per year in California.” CAL. CODE REGS. tit. 17 § 95486(c), (e)(2). Under Method 2B, a producer can propose an entirely new, individualized pathway that is not found on the default pathway. *Id.* § 95486(d).

³⁷ See CAL. CODE REGS. tit. 17, § 95486(c), (d).

³⁸ Op-Ed., *California’s Proposed Low Carbon Fuel Standard*, L.A. TIMES, Apr. 20, 2009, <http://www.latimes.com/opinion/la-ed-lowcarbon20-2009apr20-story.html>, archived at <http://perma.cc/N6SN-SLBG>.

Union (“Rocky Mountain”) filed suit against CARB in the District Court for the Eastern District of California, raising a constitutional challenge against the LCFS’s lifecycle analysis.³⁹ According to Rocky Mountain, because CO₂ emitted during production and transportation is included in the calculus of carbon intensity scores, the LCFS significantly disadvantages non-Californian ethanol producers and sellers.⁴⁰ Further, Rocky Mountain argued that the categorization of fuels by clearly differentiating between ethanol produced in California and ethanol produced in the Midwest is discriminatory,⁴¹ and that the alternative reporting pathways under Methods 2A and 2B place a discriminatory burden on Midwest industries.⁴²

On December 29, 2011, the district court granted Rocky Mountain’s motion for summary judgment, holding that the LCFS violated the Dormant Commerce Clause.⁴³ The court enjoined enforcement of the LCFS for the “pendency of the litigation.”⁴⁴ The court found the ethanol provisions to be facially discriminatory, and thus applied strict scrutiny in its consideration of the LCFS’s constitutionality.⁴⁵ Effectively, the court ruled that the lifecycle analysis, which utilizes regional categories and default pathways, is unconstitutional because the out-of-state fuels unavoidably have higher carbon intensity scores largely based on their locations of origin.⁴⁶ Concluding that, pursuant to a strict scrutiny analysis, the LCFS was discriminatory, and that the defendants failed to establish that it could not employ a nondiscriminatory alternative, the court granted the plaintiffs’ motion for a preliminary injunction to prohibit the enforcement of the regulation.⁴⁷

CARB timely appealed the district court’s decision to the U.S. Court of Appeals for the Ninth Circuit.⁴⁸ On appeal, the Ninth Circuit concluded that the LCFS treats a fuel by its carbon intensity score, and not by its origin, and only considers location “to the extent that location affects the actual GHG emissions attributable to a default pathway.”⁴⁹ The court further held that the use of default pathways and regional categories are not discriminatory “because they reflect the reality of assessing and attempting to limit

³⁹ See *Rocky Mountain Farmers Union v. Goldstone*, 843 F. Supp. 2d 1071, 1071 (D. Cal. 2011), *aff’d in part, rev’d in part sub nom. Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013).

⁴⁰ See *id.* at 1087.

⁴¹ See *id.* at 1090.

⁴² See *Corey*, 730 F.3d at 1094.

⁴³ See *Goldstone*, 843 F.Supp. 2d at 1078–79.

⁴⁴ *Id.* at 1079.

⁴⁵ See *id.* at 1085–87.

⁴⁶ See *id.* at 1087.

⁴⁷ *Id.* at 1105.

⁴⁸ *Corey*, 730 F.3d at 1086.

⁴⁹ *Id.* at 1089.

GHG emissions from ethanol production.”⁵⁰ The court also vacated the injunction and remanded the case to the district court.⁵¹

II. LEGAL BACKGROUND

There is no constitutional provision that expressly forbids a state from enacting laws that burden interstate commerce.⁵² The U.S. Supreme Court has, however, repeatedly inferred such a limitation from the Commerce Clause’s grant of the power to the federal government to regulate the interstate commerce.⁵³ Dormant Commerce Clause⁵⁴ jurisprudence has played a primary role in restricting the ability of state governments to practice economic protectionism and regulations of out-of-state conduct that would otherwise “excite those jealousies and retaliatory measures the Constitution was designed to prevent.”⁵⁵ Today, “a virtually *per se* rule of invalidity” governs if it is established that a state enacted a discriminatory statute that protects its economic interests at the cost of burdening interstate commerce.⁵⁶ A discriminatory statute may only overcome the strong presumption of unconstitutionality if the enacting state can show (1) a legitimate local purpose that (2) could not be served by a non-discriminatory alternative.⁵⁷

Congress enacted the Clean Air Act (“CAA”) in 1963 to create a uniform law for controlling air pollution.⁵⁸ It mandates that “no State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor

⁵⁰ *Id.* at 1093.

⁵¹ On remand, it instructed the district court to consider whether the LCFS discriminates in purpose or practical effect, and if not, to apply the more lenient *Pike* balancing test. *See id.* at 1107; *infra* notes 63–71 and accompanying text.

⁵² *See* U.S. CONST. art. I, § 8, cl. 3.

⁵³ *See* *Or. Waste Sys., Inc. v. Or. Dep’t of Env’tl. Quality*, 511 U.S. 93, 98 (1994) (noting that the Commerce Clause acts as a grant of authority to Congress and a limitation on the states); WILLIAM J. RICH, 3 MODERN CONSTITUTIONAL LAW § 34:23 (3rd ed. 2011). *See generally* *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992) (holding that Alabama’s waste disposal fee on hazardous waste generated out-of-state violated the Commerce Clause); *City of Phila. v. New Jersey*, 437 U.S. 617 (1978) (holding that New Jersey’s prohibition on out-of-state waste violated the Commerce Clause).

⁵⁴ “When Congress has not acted to address a particular issue or activity, the Commerce Clause is said to be ‘dormant’ in the context of that issue.” RICH, *supra* note 53, § 34:23.

⁵⁵ *See* *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (citing THE FEDERALIST NO. 22, at 143–45 (Alexander Hamilton) (C. Rossiter ed., 1961)).

⁵⁶ *City of Philadelphia*, 437 U.S. at 623–24.

⁵⁷ *Maine v. Taylor*, 477 U.S. 131, 139 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

⁵⁸ *See* Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1078 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014).

vehicle engines”⁵⁹ In an apparent contradiction, however, section 209(a) of the CAA exclusively allows California to waive this restriction and to create its own anti-pollution rules.⁶⁰ It also allows other states to adopt California’s standards.⁶¹ The only requirements for the statutory allowance are that California’s standards “will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards,” that California’s determination is not arbitrary or capricious, that such standards are necessary to “meet compelling and extraordinary conditions,” and that the standards are consistent with section 202(a).⁶²

State laws have been challenged on Dormant Commerce Clause grounds several times.⁶³ In these cases, the legality of the state regulation hinged on whether the court chose to apply strict scrutiny, or the more lenient *Pike v. Bruce Church, Inc.* balancing test.⁶⁴ The Supreme Court, in *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, explained that discrimination is found where a state statute treats in-state and out-of-state commercial actors differently, to the benefit of the former and burden of the latter.⁶⁵ Courts will find discrimination if the statute is *facially discriminatory* or if it is *discriminatory in purpose and effect*.⁶⁶ In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, the Court found a tax break for summer camps that served primarily in-state campers to be *facially dis-*

⁵⁹ 42 U.S.C. § 7543(a).

⁶⁰ *Id.* § 7543(b).

⁶¹ *See id.*

⁶² *Id.* Section 202(a) sets out the CAA’s emissions and fuel standards. *Id.* § 7521(a). Such deference towards California stems from Congress’s belief in the state’s “pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program” *Corey*, 730 F.3d at 1079 (quoting *Motor & Equip. Mfrs. Ass’n v. Env’tl. Prot. Agency*, 627 F.2d 1095, 1109 (D.C. Cir. 1979)).

⁶³ Specifically, that a state regulation is discriminatory if it treats products differently based on state boundaries alone. *See, e.g., Or. Waste Sys., Inc. v. Or. Dep’t of Env’tl. Quality*, 511 U.S. 93, 95 (1994) (challenging a surcharge on waste coming in from out-of-state); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 336 (1992) (challenging a disposal fee for out-of-state waste); *City of Phila. v. New Jersey*, 437 U.S. 617, 618 (1978) (challenging an outright prohibition on the import of out-of-state waste).

⁶⁴ *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 146 (1970). The *Pike* test considers the burden on interstate commerce, against the state’s interest. *See id.* at 139–40, 146. If the state interest outweighs the burden on commerce, it is permissible. *See id.* But, if the burden on interstate commerce is “clearly excessive,” the law will be struck down as unconstitutional. *Id.* at 142. *Compare Hunt*, 504 U.S. at 348 (striking down regulation under strict scrutiny review), with *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (upholding county waste flow control ordinances under *Pike* because the incidental burden on interstate commerce was clearly not excessive in relation to local benefits).

⁶⁵ *Oregon Waste Systems*, 511 U.S. at 99–100.

⁶⁶ *See* 520 U.S. 564, 575–76 (1997) (finding a tax break for summer camps serving primarily out-of-state children *facially discriminatory*).

criminary.⁶⁷ Further, the Court noted that once it is deemed facially discriminatory, there is no need to look at the purpose or effect of the statute.⁶⁸

If a state statute is found facially discriminatory, the reviewing court must apply the “strictest scrutiny,”⁶⁹ under which the discrimination is “*per se* unconstitutional unless the state defending the law can demonstrate both a legitimate local purpose and that the same purpose could not be served through less discriminatory means.”⁷⁰ If, alternatively, the state law is found to be non-discriminatory and to have merely an incidental effect on interstate commerce, the *Pike* balancing test—requiring the claimant to show that the “burden on interstate commerce . . . is ‘clearly excessive’ in relation to its local benefits”—is to be applied.⁷¹

In *City of Philadelphia v. New Jersey*, the Supreme Court held that a New Jersey state statute violated the Dormant Commerce Clause.⁷² The New Jersey legislature had enacted a law that prohibited the importation of solid or liquid waste from other states, in an effort to protect its environment and its citizens’ health.⁷³ Aside from the geographic locations where they were collected, the restricted out-of-state waste was no different from the waste that originated within state boundaries.⁷⁴ The Court explained that when a state law is facially discriminatory, courts must apply a virtually *per se* rule of invalidity in their review of the legal challenge.⁷⁵ The Court found that, based on this standard, the New Jersey statute was facially discriminatory because the state could not show “some reason, apart from [the products’] origin, to treat them differently.”⁷⁶

Similarly, in *West Lynn Creamery, Inc. v. Healy*, as Massachusetts’s dairy farmers began running out of business due to dropping milk prices in 1992, the Massachusetts Department of Food and Agriculture issued a pricing order that taxed all raw milk produced out-of-state and used the resulting revenue to subsidize its dairy farmers.⁷⁷ The Supreme Court reversed the Massachusetts Supreme Judicial Court’s decision, holding that the pricing order was a violation of the Dormant Commerce Clause because it ben-

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

⁷⁰ *Oregon Waste Systems*, 511 U.S. at 99; see William Griffin, Note, *Renewable Portfolio Standards and the Dormant Commerce Clause: The Case for In-Region Location Requirements*, 41 B.C. ENVTL. AFF. L. REV. 133, 145 (2014) (citing *Oregon Waste Systems*, 511 U.S. at 99).

⁷¹ See *Pike*, 397 U.S. at 142.

⁷² 437 U.S. 617, 618 (1978).

⁷³ See *id.* at 629–30.

⁷⁴ See *id.* at 629.

⁷⁵ See *id.* at 624.

⁷⁶ See *id.* at 626–27.

⁷⁷ 512 U.S. 186, 188–98 (1994).

effitted Massachusetts's economic interests at the expense of out-of-state milk producers.⁷⁸

Moreover, in *Chemical Waste Management, Inc. v. Hunt*, Alabama enacted a similar statute imposing a fee on hazardous wastes originating in other states.⁷⁹ The Court struck the fee down as unconstitutional, but explained that there may be an exception when a state demonstrates that its protectionist measure has "boundaries and [that] the process of setting them reflected genuine attention to the legitimate goals of regulation and not a mere hostility to trade."⁸⁰ For this exception, the Court cited to its holding in *Oregon-Washington Railroad & Navigation Co. v. Washington*.⁸¹ In *Oregon-Washington Railroad & Navigation*, the Court heard a challenge to Washington's quarantine of certain shipments of alfalfa from neighboring states.⁸² The Court held that because of Washington's "investigation actually made into the existence of the weevils and its geographical location," the law was "a real quarantine law and not a mere inhibition against importation"⁸³ The Court thus held the quarantine did not violate the Commerce Clause.⁸⁴

In *Maine v. Taylor*, the Supreme Court came to a rare Dormant Commerce Clause finding that a state statute was facially discriminatory and yet permissible after passing strict scrutiny.⁸⁵ The Court found Maine's ban on the importation of live baitfish from other states to protect its fisheries from parasites and non-native species, despite being facially discriminatory, was constitutional because Maine had shown a legitimate local purpose that could not be adequately served by available non-discriminatory alternatives.⁸⁶ The Court further explained that the evidence showed legitimate scientific reasons other than origin to discriminate against out-of-state live baitfish, and therefore held the statute was not "a case of arbitrary discrimination against interstate commerce."⁸⁷

⁷⁸ The Court reasoned that the law effectively functioned as a tariff—an unconstitutional restriction on interstate commerce. *See id.* at 194–96, 207.

⁷⁹ 504 U.S. 334, 334, 336 (1992).

⁸⁰ *Id.* at 347 & n.11 (citing *Or.-Wash. R.R. & Navigation Co. v. Washington*, 270 U.S. 87, 96 (1926)).

⁸¹ *See id.* at 347 & n.11 (citing *Or.-Wash. R.R. & Navigation Co.*, 270 U.S. at 96).

⁸² *See Or.-Wash. R.R. & Navigation Co.*, 270 U.S. at 90–91. Washington had blocked shipments of alfalfa, except in sealed containers, from nearby states whose crops had been suffering from alfalfa weevil infestation. *See id.* at 90–91. Weevils are pest insects that rapidly propagate by depositing eggs on the crop plants' leaves, which, when transported to a different location, can infect the growing crop at the new location. *Id.* at 90.

⁸³ *Id.* at 96.

⁸⁴ *See id.*

⁸⁵ *See* 477 U.S. 131, 151–52 (1986).

⁸⁶ *Id.* at 148, 151.

⁸⁷ *Id.* at 141–44, 151.

III. ANALYSIS

In *Rocky Mountain Farmers Union v. Corey*, the U.S. Court of Appeals for the Ninth Circuit held that California's Low-Carbon Fuel Standard ("LCFS") is not a violation of the Dormant Commerce Clause.⁸⁸ The court rejected the plaintiff's argument that the LCFS is facially discriminatory because of its lifecycle analysis requirements, and thus that strict scrutiny review *must* be employed in the judicial review of its challenge.⁸⁹ In partial dissent, Judge Murguia criticized the holding, suggesting the majority erred by placing "the cart before the horse [when it considered] California's reasons for distinguishing between in-state and out-of-state ethanol before examining the text of the statute to determine if it facially discriminate[s]" against out-of-state producers.⁹⁰ Judge Murguia cited to *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, in which he argued, the Supreme Court instructed that the determination of whether the text of a regulation itself is discriminatory must come before analyzing "the purported reasons for the discrimination."⁹¹ He contested that the majority should have found the LCFS facially discriminatory based on its text, because Table 6 clearly differentiates between California and Midwest products, and assigns higher carbon intensity scores to the latter.⁹²

The Ninth Circuit should have found the LCFS facially discriminatory, consistent with the dissent's assertions, because Table 6 and the statutory text of the LCFS distinguish between California and Midwest ethanol fuels based on regional boundaries.⁹³ As Judge Murguia correctly stated, the Supreme Court in *Camps Newfound/Owatonna* instructed that when the text of a statute or regulation expressly distinguishes economic entities based on geography, courts need not look any further, the law is facially discriminatory.⁹⁴ The *Camps Newfound/Owatonna* instruction does not diverge from the Supreme Court's rule in *Oregon Waste Systems Inc. v. Department of Environmental Quality* that the Dormant Commerce Clause is violated where there is simply a "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."⁹⁵ Regardless of the purported reasons that California provided for their struc-

⁸⁸ *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1107 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014).

⁸⁹ *See id.* at 1107–08 (remanding to the district court to determine whether strict scrutiny or the *Pike* balancing test should be employed).

⁹⁰ *Id.* at 1108 (Murguia, J., dissenting).

⁹¹ *Id.* (citing 520 U.S. 564, 575–76 (1997)).

⁹² *See id.*

⁹³ *See id.*; CAL. CODE REGS. tit. 17, § 95486(b)(1) tbl.6 (2010).

⁹⁴ *See* 520 U.S. at 575–76.

⁹⁵ *Id.*; *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994).

ture, Table 6 and the statutory text plainly distinguish between California and Midwest ethanol fuels based on regional boundaries.⁹⁶

Had the Ninth Circuit acknowledged the facial discrimination in the LCFS, and thus applied strict scrutiny, the law should have nonetheless survived strict scrutiny review.⁹⁷ California readily demonstrated that the LCFS serves a legitimate local purpose, thus satisfying the first requirement of strict scrutiny review.⁹⁸ The Supreme Court has allowed certain types of otherwise unallowable discrimination where a state seeks to “[guard] against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible.”⁹⁹ By confronting the catastrophic threats posed by climate change, California employed allowable discrimination due to legitimate concerns about protecting its citizens by minimizing transport fuel greenhouse gas (“GHG”) emissions.¹⁰⁰

California could further show that the aforementioned purpose could not be served as well by other available, non-discriminatory means, thereby satisfying the second prong of strict scrutiny review.¹⁰¹ The California Air Resources Board (“CARB”) successfully explained that the default pathways in Table 6 were designed to sort multiple ethanol producers under regional categories so that it could avoid enforcing costly and unnecessary individualized determinations for each and every ethanol producer that seeks to service the state.¹⁰² Further, it was shown that the LCFS also provided a set of alternative reporting methods for ethanol producers who would rather register an individualized pathway.¹⁰³ Taken together, the default pathways represented a logical and non-restricting means to allow all ethanol producers to efficiently satisfy the reporting requirement, rather than a tool to unfairly burden out-of-state products, as argued by the plaintiffs.¹⁰⁴ As the Supreme Court stated in *Maine v. Taylor*, “the constitutional principles underlying the [C]ommerce [C]lause cannot be read as requiring

⁹⁶ See CAL. CODE REGS. tit. 17, § 95486(b)(1) tbl.6.

⁹⁷ See *Maine v. Taylor*, 477 U.S. 131, 147, 151–52 (1986) (holding that Maine’s desire to limit invasive species was a legitimate local interest and that prohibiting the import of baitfish was the least discriminatory means of achieving that purpose).

⁹⁸ *Corey*, 730 F.3d at 1109 (Murguia, J., dissenting) (applying strict scrutiny to the LCFS and finding a legitimate local purpose).

⁹⁹ *Taylor*, 477 U.S. at 148.

¹⁰⁰ See *supra* notes 8–12 and accompanying text; see also *Corey*, 730 F.3d at 1109 (Murguia, J., dissenting) (finding that reducing GHG emissions is a legitimate local interest).

¹⁰¹ *Corey*, 730 F.3d at 1093; see *Taylor*, 477 U.S. at 151; *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

¹⁰² See *Corey*, 730 F.3d at 1093.

¹⁰³ At least one Midwest producer has already done so to achieve the lowest carbon intensity. See *Corey*, 730 F.3d at 1084; CAL. CODE REGS. tit. 17, § 95486(c), (d) (2010).

¹⁰⁴ See *Corey*, 730 F.3d at 1094.

[a state] to sit idly by and wait until potentially irreversible environmental damage has occurred.”¹⁰⁵

By denying certiorari, the Supreme Court missed a clear-cut opportunity to instruct lower courts on whether it is permissible under strict scrutiny review to consider the purported reasons for a state law’s distinction between in-state and out-of-state products, or if instead, courts must first employ a facial textual analysis of the statutory language.¹⁰⁶ The assessment of facial discrimination plays a crucial role in a Dormant Commerce Clause analysis because it determines whether the contested state law is reviewed under the strict scrutiny test or the much more lenient *Pike* balancing test.¹⁰⁷ As illustrated by the holding in *Corey*, future litigation on this issue will run into the same analytical dilemma because a strictly textual review of the lifecycle analysis employed in the LCFS could fall under the *Oregon Waste Systems, Inc.* definition of discrimination.¹⁰⁸

The Supreme Court had further reason to consider the LCFS due to the increased presence of similar state and regional fuel standards emerging across the country.¹⁰⁹ Because section 209(a) of the Clean Air Act specifically allows other states to adopt California’s emission standards,¹¹⁰ a handful of state legislatures have already shown interest in enacting similar laws in furtherance of their own efforts to combat the negative effects of climate change on their citizens and environments.¹¹¹ In fact, in 2009, Oregon passed a bill implementing its own LCFS—based on the California law—and, in the same year, a consortium of eleven states in the Northeast and Mid-Atlantic committed to creating a *regional* LCFS that will cover the entire geographic region.¹¹² With states preparing to enact laws that will facially discriminate against Midwest ethanol suppliers, it is likely only a

¹⁰⁵ *Taylor*, 477 U.S. at 148 (quoting *United States v. Taylor*, 585 F. Supp. 393, 397 (D. Me. 1984)). Table 6, therefore, serves legitimate reasons and is not merely geographic discrimination. *See id.* at 151.

¹⁰⁶ *Compare* *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575–76 (1997) (ending the discrimination inquiry once the Court found that the statute expressly distinguished economic entities based on geographic factors), *with Corey*, 730 F.3d at 1107 (looking beyond the text of the LCFS to find that it was not discriminatory even though it made express distinctions based on geography).

¹⁰⁷ *See supra* notes 63–71 and accompanying text.

¹⁰⁸ *See Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994) (noting that “‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter”).

¹⁰⁹ *See infra* notes 110–113 and accompanying text.

¹¹⁰ *See supra* note 58–62 and accompanying text.

¹¹¹ *See* OR. REV. STAT. ANN. § 36.468A (West 2010); Memorandum of Understanding on the Northeast and Mid-Atlantic Low Carbon Fuel Standard, Between the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont (Dec. 30, 2009), *archived at* <https://perma.cc/H5DQ-3NNH?type=pdf>.

¹¹² *See* OR. REV. STAT. ANN. § 36.468A.

matter of time before a surge of related litigation reaches district courts around the country.¹¹³

CONCLUSION

The majority and the partially dissenting opinion in *Rocky Mountain Farmers Union v. Corey*, when read in conjunction, expose the need for a clear judicial instruction from the Supreme Court on deciding Dormant Commerce Clause cases. The Supreme Court should clarify when state legislation is facially discriminatory, but nonetheless allowable, after strict scrutiny review, and further, when the state can prove that the impetus for the law was a legitimate reason to employ such discrimination regardless of any textual discrimination. Although California's Low-Carbon Fuel Standard represents a crucial step towards controlling greenhouse gas emissions in the fight against climate change, it should not have been permitted to evade strict scrutiny through an illusory finding that California's cap-and-trade law, AB-32, was not facially discriminatory, when it surely was. If the court had properly reviewed the statute under strict scrutiny, however, the law would have nonetheless withstood it, because of its legitimate local purpose and the inability to create the same effect through other, non-discriminatory means.

¹¹³ See *supra* notes 88–112 and accompanying text.